Supreme Court, U.S.
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Docket No.: _____

SUPREME COURT OF THE UNITED STATES

WISMANN LUDGER, et al., Petitioners

vs.

HELM AG and VOS BV, Respondents

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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PETITION FOR WRIT OF CERTIORARI

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68 pp

QUESTION PRESENTED FOR REVIEW

. Whether the Eleventh Circuit Court of Appeals erroneously decided an important question of federal law concerning whether the families of dead or dying Haitian children should be allowed to amend their Complaint to assert claims under the Alien Tort Claims Act, 28 U.S.C. § 1350, against providers of lethal pharmaceutical products, who knew the products to be tainted.

LIST OF ALL PARTIES TO PROCEEDING

PARTIES:

ALINE ALEXANDRE, as personal representative of the Estate of Stanley Mardy (deceased);

CHARLITOT "CHARLIE" ALEXIS, as personal representative of the Estate of David Alexis (deceased);

HUBERT ALEXIS, as personal representative of the Estate of Therbuh Alexis (deceased);

EDDY BENJAMIN, as personal representative of the Estate of Benjamin Peterson (deceased);

MOREL BERARD, as personal representative of the Estate of Rose-Cathie Berard (deceased);

YANICK BLAISE, as personal representative of the Estate of Albert Patrice (deceased);

SYLVESTER CADET, as personal representative of the Estate of Mithsou Cadet (deceased); and as natural parent and guardian of Spady Cadet, a minor;

LUC CENAT, as personal representative of the Estate of Cherlot Cenat (deceased);

ROOSEVELT CENATUS, as personal representative of the Estate of Louvenice Cenatus (deceased);

JACQUELINE CHARLES, as personal representative of the Estate of Claire Sarllah Charles-Francois (deceased);

MARIE ELINE CLERMOND, as personal representative of the Estate of Claurens Clermond (deceased);

JOSEPH EMMANUEL CLERVIL, as personal representative of the Estate of Westingueire Clervil (deceased);

JEAN FITO DANIEL, as personal representative of the Estate of Sabine Daniel (deceased);

LEONIE DERIVEAU, as natural parent and guardian of Kesnia Thama Gracia, a minor;

MARIE DEPHOSE DORCELUS, as personal representative of the Estate of Naomie Dorcelus (deceased);

SAMUEL DOUCE, as personal representative of the Estate of Wildor Douce (deceased);
MARIE EDME, as natural parent and guardian of Antonioni Philibert, a minor;
JEAN CLAUDE GEDEON, as personal representative of the Estate of Godson Gedeon (deceased);
ROGER GERARD, as personal representative of the Estate of Falonne Gerard (deceased);
LOUIS KESNEL GRACIA, as natural parent and guardian of Kesnia Thama Gracia, a minor;
MICHELINE GREGOIRE, as personal representative of the Estate of Farah Raphael (deceased);
HELM AG;
HELM U.S. CHEMICAL CORP.;
HELM NEW YORK CHEMICAL CORP.;
HELM FERTILIZER, HELENA TERMINAL;
HELM FERTILIZER CORP.;
HELM FERTILIZER TERMINAL INC.;
NICOLE HILIARE, as personal representative of the Estate of Harryson Charles Fils (deceased);

ALTAGRACE JACKSON, as natural parent and guardian of Rood Schneider Jackson, a minor;
FENOLD JACKSON, as personal representative of the Estate of Bill Jerry Jackson (deceased); and as natural parent and guardian of Rood Schneider Jackson, a minor;
HABIB JAMIL-ALI, as personal representative of the Estate of Shemli Jamil Ali (deceased);
EVENS JEAN, as natural parent and guardian of Samir Jean, a minor;
MARIE ALCIONNE A. JEAN, as natural parent and guardian of Samir Jean, a minor;
WISLIN JEAN, as natural parent and guardian of Faika Jean, a minor;
MARIE CAMEL JEAN-BAPTISTE, as personal representative of the Estate of Vandelfric Jean-Baptiste (deceased);
GERALD JOACHIM, as personal representative of the Estate of Rachelle Joachim (deceased); and as natural parent and guardian of Jamason Joachim, a minor;

MARIE ROSELENE JOSEPH, as personal representative of the Estate of Samuel Davens Joseph (deceased);

VILINORD LECLERC, as personal representative of the Estate of Walsonord De Kingkino Leclerc (deceased);

MARIETTE HILDA LOUIS, as personal representative of the Estate of Christy Laure Louis (deceased);

WISMANN LUDGER, as personal representative of the Estate of Youri Ludger (deceased);

DARLYNE MACON, as natural parent and guardian of Oliver Macon, a minor;

MERSON MACON, as natural parent and guardian of Oliver Macon, a minor;

FRANTZ MICHEL, as natural parent and guardian of Erwen Michel, a minor;

JEAN FRANCOIS MIMOSE, as natural parent and guardian of Spady Cadet, a minor;

EYLSEE MINOUSE, as natural parent and guardian of Jamason Joachim, a

JEAN ROOSEVELT MONDESIR, as personal representative of the Estate of Vladimir Mondesir (deceased);

LUCINE MOUSSIGNAC, as personal representative of the Estate of Micheline Moussignac (deceased);

MARIE MYRTHIL, as personal representative of the Estate of Schneilyne Vibert (deceased);

ROMANE NORE, as personal representative of the Estate of Jemimah Nore (deceased);

CELITA PAULEUS, as personal representative of the Estate of Stephanie Pierre Louis (deceased);

MARIE PAYEN, as personal representative of the Estate of Pamela Sue Payen (deceased);

PIERRE PHILIBERT, as natural parent and guardian of Antonioni Philibert, a minor;

YVROSE PIERRE-LOUIS, as personal representative of the Estate of Jean-Louis Daril Michel (deceased); and natural parent and guardian of Erwen Michel, a minor;

ASTRIDE RICHARD, as natural parent and guardian of Faika Jean, a minor;

FRITZ ST. JEAN, as personal representative of the Estate of Nico Phillipe Kervens St. Jean (deceased);

MARIE ANITHE ST. JEAN, as personal representative of the Estate of Cindy Barthelus (deceased);

VERDIEU ST. LOUIS, as personal representative of the Estate of Farah St. Louis (deceased);

MICHEL ST. VAL., as personal representative of the Estate of Mirlene St. Val, (deceased);

ELVIA SEMERZIER, as personal representative of the Estate of Makenson La Fortune (deceased);

JEAN TELEMAQUE, as personal representative of the Estate of Stanley Telemaque (deceased);

VENANTE VILLARSSON, as personal representative of the Estate of Mathieu Rocheny (deceased);

VOS B.V.;

LUC ZAMOR, as personal representative of the Estate of Pierre Ludenson Zamor (deceased); and

MASCELIN ZEPHYR, as personal representative of the Estate of Daphnee Zephyr (deceased).

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CITATIONS OF OFFICIAL AND UNOFFICIAL REPORTS OF THE OPINIONS AND ORDERS ENTERED IN THE CASE BY COURTS OR ADMINISTRATIVE AGENCIES

Order Dismissing Petitioners' Amended Complaint, United States District Court, Southern District of Florida, Entered on July 15, 1998

Order Affirming District Court's Order of Dismissal, Entered on November 16, 1999, Issued as Mandate on January 24, 2000

STATEMENT OF JURISDICTION

This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1) in that Petitioners seek a writ of certiorari from an Order of the 11th Circuit Court of Appeals affirming a final decision of the District Court dismissing Petitioners' Amended Complaint with prejudice. The adverse judgment was entered by the 11th Circuit on November 16, 1999. There are currently no orders filed regarding rehearing, nor are there any orders regarding an extension of time to file this petition for a writ of certiorari. A statement of notifications pursuant to Supreme Court Rule 29.4(B) or (C) is not necessary in this case.

STATEMENT OF CONSTITUTIONAL STATUTES INVOLVED

28 U.S.C. § 1350

Alien's action for tort.

The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.

12(b) Fed.R.Civ.P.

(b) **How Presented**. Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter, (2) lack of

jurisdiction over the person, (3) improper venue, (4) insufficiency of process, (5) insufficiency of service of process, (6) failure to state a claim upon which relief can be granted, (7) failure to join a party under Rule 19. A motion making any of these defenses shall be made before pleading if a further pleading is permitted. No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion. If a pleading sets forth a claim for relief to which the adverse party is not required to serve a responsive pleading, the adverse party may assert at the trial any defense in law or fact to that claim for relief. If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside

the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

15(a) Fed.R.Civ.P.

(a) **Amendments.** A party may amend the party's pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, the party may so amend it at any time within 20 days after it is served. Otherwise a party may amend the party's pleading only by leave of court or by written

consent of the adverse party; and leave shall be freely given when justice so requires. A party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within 10 days after service of the amended pleading, whichever period may be the longer, unless the court otherwise orders.

STATEMENT OF THE CASE

This case arises from the widely publicized death of at least eighty-eight (88) young children from Haiti as a result of their ingestion of anti-fever syrups which were laced with highly toxic diethylene glycol.[1] In addition to the deaths of many children, many other children required treatment in the United States, and will need treatment for renal failure likely for the remainder of their lives. This case was filed on or about February 1997 against Helm AG and VOS B.V. as a result of their participation in the events giving rise to the tragedy. Id.

(i) COURSE OF PROCEEDINGS

Originally, Plaintiffs filed a Complaint on behalf of the representatives of some thirty-eight (38) children who died or were severely injured as a result of the ingestion of the laced anti-fever medicine. Before Defendants responded, however, Appellants amended their Complaint primarily to include additional Plaintiffs who were discovered to have been

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[1] The incident has been chronicled in several publications, as well as in two separate features on the "60 Minutes" television news program.

affected by the toxic formula. The Amended Complaint serves as the operative pleading, which the Court dismissed without allowing Plaintiffs any opportunity to amend.

The Amended Complaint contains allegations relating in a general way to Defendants' conduct in connection with the poisoning of the Haitian children as well as the damages suffered by the Plaintiffs. In essence, Plaintiffs allege that the Defendants, who are in the chemical and pharmaceutical business, knowingly provided the lethal component of the anti-fever syrup mixture, and warranted, assayed, tested and relabeled that component (glycerin) as 98% pure and pharmaceutical grade. In reality, the glycerine was not even close to 98% pure because it contained lethal amounts of dietheylene glycol which ultimately caused the deaths of Plaintiffs. More specifically, Plaintiffs allege that the Defendants obliterated labels on the glycerin and then falsely relabeled the glycerin to

establish its purity.[2] After relabeling the glycerin, the drums were shipped directly from Defendants to the pharmaceutical manufacturer in Haiti. The manufacturer then utilized the tainted glycerin in the manufacture of children's anti-fever medication, which was sold over-the-counter to the unsuspecting Plaintiffs. In addition to the factual recitations, Plaintiffs assert counts for negligence, strict liability and breach of implied warranty against the Defendants. Importantly, the Amended Complaint does not include allegations brought under the Alien Tort Claims Act, 28 U.S.C. § 1350. Plaintiffs sought leave to add such a claim, but were denied the opportunity.

Defendants responded to the Amended Complaint with a Motion to Dismiss pursuant to Rule 12(b), Fed. R. Civ. P. In that Motion to Dismiss, Defendants raised two arguments for dismissal of the

[2] It was discovered that Defendants actually tested the gylcerin and the test results showed the glycerin to be only 53.9% pure and to have significant discoloration.

Complaint: (1) lack of subject matter jurisdiction; and (2) lack of personal jurisdiction. Id. Because the Amended Complaint did not contain allegations specifically directed at federal jurisdiction under the Alien Tort Claims Act, 28 U.S.C. § 1350, Defendants did not address jurisdictional issues under that Act in their original Motion to Dismiss. Id.

Shortly after the Motion to Dismiss had been filed, the Court called a status conference, during which the various issues relating to the Motion to Dismiss were addressed. At that status conference, Plaintiffs indicated their need to conduct discovery as to the issue of personal jurisdiction. In response, the Court initially suggested that it would allow discovery on the personal jurisdiction issue. Subsequently, however, the parties suggested bifurcating the subject matter and personal jurisdiction issues and the Court entered an Order deferring discovery until after the resolution of the issues relating to subject matter jurisdiction. Therefore, all briefing following the status conference related only to subject matter jurisdiction.

Importantly, at the status conference, Plaintiffs requested leave to amend their pleading to include allegations supportive of their claims under the Alien Tort Claims Act. Plaintiffs were concerned that no claim had been asserted under the Alien Tort Claims Act and the Court would likely limit its ruling on the Motion to Dismiss to the allegations contained in Plaintiffs' original pleadings. The Court denied Plaintiffs' request, and instead requested that Plaintiff brief subject matter jurisdiction from the allegations as contained in the Amended Complaint.

In responding to Defendants' Motion to Dismiss, Plaintiffs again requested leave to file an amended Complaint.

True to Plaintiffs' concerns, the District Court based its decision to dismiss on the allegations of the Amended Complaint, without allowing Plaintiffs the opportunity to supplement the allegations to state a claim under the Alien Tort Claims Act. For example, the crux of the Court's ruling stated:

> "Under the facts as alleged [referring to the Amended Complaint], the defendants

did not manufacture the glycerine, but participated in the chain of destruction of the product . . .

These allegations do not constitute a violation of the "law of nations." (Emphasis Added).

Obviously, because Plaintiffs' Amended Complaint was not directed towards a claim under the Alien Tort Claims Act, the Amended Complaint did not contain such allegations.[3]

The Court's analysis of only the allegations of the Amended Complaint without allowing leave to amend was not an uninvited exercise. At the status conference, in response to Plaintiffs' request for leave to amend, Defendants circuitously (and incorrectly) argued that the Court was precluded from allowing amendment of the Amended Complaint because it had no subject matter jurisdiction to allow amendment. Again in response to Plaintiffs' brief on the motion to

[3] Indeed, Plaintiffs' counsel were in the process of securing affidavits from experts in the areas of international law and world health which would have been used to establish the law of nations and violations thereof by HELM/VOS.

dismiss, Defendants vociferously argued that the issue of subject matter jurisdiction "must be determined only by the content of the Complaint", and that any matters presented in Plaintiffs' papers in response to the Motion to Dismiss "not found in the Complaint are irrelevant". Indeed, throughout their reply memorandum, Defendants continuously urged the Court to ignore all allegations other than those made in the Amended Complaint; allegations which all parties knew were preliminary and were not tailored to a claim under the Alien Tort Claims Act.

In the wake of Defendants' arguments that review be limited only to the allegations set forth in Plaintiffs' Amended Complaint without allowing leave to amend, the Court found the allegations insufficient to assert a claim under the Alien Tort Claims Act. By failing to allow leave to amend, the District Court raised an important question of federal law. As set forth below, that question concerns whether conduct in violation of the law of nations action which causes the loss of human life can give rise to an action under the Alien Tort Claims Act.

(ii) STATEMENT OF THE FACTS

Between 1995 and 1996, eighty-eight children, between the ages of one (1) month and twelve (12) years of age, died as a result of ingesting anti-fever medication laced with diethylene glycol (anti-freeze). One-hundred nine (109) children were documented to have developed renal failure as a result of taking the corrupt anti-fever medication. Plaintiffs, who are attempting to vindicate their rights against those responsible for the mass killings and poisonings, filed a lawsuit in the Southern District of Florida, seeking to assert claims against the perpetrators of the tragedy, VOS and Helm.

Helm is a worldwide pharmaceutical manufacturer/distributor with offices in several states within the United States, including Florida. VOS is the distribution arm of HELM and acts as a daughter company to HELM. Id. Both HELM and VOS are heavily involved in the worldwide distribution of pharmaceutical grade chemicals for use in the production of retail pharmaceutical products. Id. HELM and VOS also distribute large quantities of

pharmaceutical products to third-world countries in Africa and the Caribbean, which countries lack the technology to inspect these products.

Prior to the tragedy which occurred in Haiti, HELM/VOS had an eventful history of shipping inferior pharmaceutical products and medical supplies to third world countries. For example, from 1985-1988, HELM/VOS sent to Botswana inferior quality surgical gloves, a shipment of Rinfampicin capsules in which at least three percent (3%) of the capsules were empty, and Vitamin B-Complex injections of improper composition. As a result of their potentially lethal activity, HELM/VOS were prohibited from shipping any more product to Botswana. Id.

Additionally, in a shipment of product to the Philippines, HELM/VOS loaded counterfeit product in the rear of a container knowing that only the products in the front of the container would be inspected prior to export. Of course, to pass inspection, HELM/VOS loaded active product in the front of the container, where they knew that the inspection would occur. Id.

Defendants' conduct does not stop there, however. HELM/VOS has been found to have shipped contaminated antibiotics to the Dominican Republic, Tanzania, Togo and Burkina and Ghana. In Ghana, HELM/VOS also shipped counterfeit chloramphenicol, ampicillin and indomethaein. Id. HELM/VOS has been prohibited from dealing in the African State of Benin as a result of importation of counterfeit drugs and sub-standard products. Simply put, HELM/VOS has a long history of attempting to reap profits from third world countries by dumping inferior, and at times, lethal products there.

HELM/VOS's illegal activity is not limited to dumping inferior and/or counterfeit products into third-world countries. In 1991, HELM was indicted and eventually plead guilty to illegally smuggling animal drugs into the United States. Additionally, in 1996, HELM again attempted to smuggle animal drugs into the State of Florida. Id.

In this case, HELM/VOS' conduct is even more atrocious than in the past. On February 25, 1995, HELM/VOS shipped approximately seventy-two (72)

drums of glycerin to Haiti, knowing that the glycerin would be used to sweeten retail pharmaceutical products. Prior to shipping the products, HELM/VOS tested the glycerin to determine its purity and its concomitant availability for use as a pharmaceutical grade product. Additionally, and apparently before receiving its test results, HELM/VOS obliterated all original labeling information on the glycerin drums, including the all-important lot and batch numbers, and then stenciled its own labels and certification onto the glycerin drums. Importantly, HELM/VOS labeled the drums as 98% pure glycerin, "USP 21" (United States Pharmacopiea Grade – an internationally recognized standard), which, according to such labeling, would make the glycerin suitable for pharmaceutical manufacturing and human consumption.[4] HELM/VOS further certified to the purchasers of the glycerin in

[4] Labeling and certification of the purity of a component of a pharmaceutical product for international use is controlled by the World Health Organization's Good Manufacturing Practices. Good Practices in the Manufacture and Quality Control of Drugs (GMP), 1969, WHA 22-50.

Haiti that the glycerin relabeled by HELM/VOS was ninety-nine percent (99%) pure.

In truth and in fact, HELM/VOS's certification and labeling was wrong, based upon the very testing conducted at HELM/VOS's request. Indeed, the laboratory with which HELM/VOS contracted determined that the glycerin, which HELM/VOS labeled as 98% pure and certified as 99% pure, was only 53.9% pure. Id. In addition, the glycerin was grossly miscolored as a result of the diethylene glycol content. Notwithstanding these results, which clearly established the glycerin as impure, HELM/VOS stood by for more than eight (8) months and watched as their mislabeled and miscertified glycerin poisoned, and eventually killed, innocent Haitian children.

Given the state of affairs in Haiti, Plaintiffs chose to file their action in the District Court of the United States. Moreover, since many of the children were treated in the United States, and because the United States FDA and CDC, at the request of the Haitian government and the United Nations (PAHO), became actively involved in evaluating and

investigating the tragedy, Plaintiffs and their attorneys believed that the United States had a significant interest in entertaining Plaintiffs' claims. Nevertheless, Plaintiffs' claims were unequivocally rejected without even allowing an opportunity to establish a jurisdictional basis for such claims.

BASIS FOR FEDERAL JURISDICTION IN THE COURT OF FIRST INSTANCE

Petitioners believe that allowing amendment to include a claim under the Alien Tort Claims Act, 28 U.S.C. § 1350, would have conferred subject matter jurisdiction upon the District Court. Since the District Court rejected Petitioners' request for amendment, the District Court refused to recognize its jurisdiction over the matter.

ARGUMENT IN SUPPORT OF ALLOWANCE OF THE WRIT OF CERTIORARI

The District Court's dismissal, and the 11th Circuit's affirmation of dismissal should be reversed and the cause should be remanded with instructions to allow Plaintiffs to amend their pleading. As demonstrated herein, the 11th Circuit Court of Appeals has decided an important question of federal law that has not been, but should be, settled by this Court. The important question of federal law that the lower courts decided incorrectly, and in contradiction to both precedent of this court, and the Federal Rules of Civil Procedure, is whether leave to amend should be freely granted under Federal Rule of Civil Procedure 15(a) under the circumstances of this case. Federal Rule of Civil Procedure 15(a) requires that leave to amend "shall be freely given when justice so requires". This rule is to be construed liberally. This court, in Foman v. Davis, 371 U.S. 178, 83 S. Ct. 227, 230 (1962) also stated that leave to amend should be "freely granted". Because the underlying facts or circumstances relied

upon by Plaintiffs may be a proper subject of relief, they should be afforded the opportunity to test their claims on the merits. Accordingly, the lower court's error does not consist of erroneous factual findings or the misapplication of a properly stated rule of law, but rather its unexplained departure from established Supreme Court precedent.

The victims who lost their children as a result of Defendants' reckless conduct are entitled to pursue relief in the lower courts. Plaintiffs seek to allege violations of the Alien Tort Claims Act, 28 U.S.C. § 1350, to vest the District Court with subject matter jurisdiction. Plaintiffs believe that they can include sufficient allegations in an amended pleading to proceed under the Act, but have been denied the opportunity to do so as a result of the lower Courts denial of Plaintiffs' request for leave to amend.

The law the lower courts were bound to follow clearly and unequivocally requires only that a Plaintiff allege a violation of the law of nations in order to invoke the Alien Tort Claims Act and thereby vest the Court with subject matter jurisdiction. Based upon the

conduct of the Defendants and the opinions of scholars, legislators and others involved in the World Health Organization, Plaintiffs are prepared to allege that Defendants violated the law of nations. However, the lower courts have denied Plaintiffs the opportunity to assert such allegations by dismissing the Amended Complaint without allowing leave to amend, and by relying on the allegations as currently plead to justify its dismissal of the action.

The lower courts erred in dismissing Plaintiffs' Amended Complaint without allowing Plaintiffs leave to amend to include a claim under the Alien Tort Claims Act, 28 U.S.C. § 1350. The Complaint cannot be dismissed, as it was in the lower courts, unless it appears beyond belief that the Plaintiffs can prove no set of facts in support of their claim which would entitle them to relief. Conley v. Gibson, 355 U.S. 41 (1957). In light of the Defendant's conduct and the opinions of scholars, legislators and others involved in the World Health Organization, it is clear that Plaintiffs can prove a set of facts in support of their claim which would entitle them to relief. Furthermore,

plaintiffs established an adequate basis to allow amendment to include jurisdictional allegations under the alien tort claims act. The law the lower Courts were bound to follow concerning the Alien Tort Claims Act, 28 U.S.C. § 1350, could not be clearer on what allegations are sufficient to allege a claim and invoke the jurisdiction of the District Court. Only three years ago, the 11th Circuit stated:

> We read [the Alien Tort Claims Act] as requiring no more than an allegation of a violation of the law of nations in order to invoke Section 1350. See, e.g., Kadic 70 F. 3d at 238 ("[T]he statute confers federal subject-matter jurisdiction when the following three conditions are satisfied: (1) an alien sues (2) for a tort (3) committed in violation of the law of nations (i.e. international law).")

Abebe-Jire v. Negewo, 72 F. 3d. 844, 847 (11th Cir. 1996).

The 11th Circuit specifically held that 28 U.S.C. § 1350, by its very terms, creates a private right of

action which may be asserted through an allegation of a violation of the law of nations. Id. The 11th Circuit further held that "Congress did not intend to require an alien plaintiff to invoke a separate enabling statute as a precondition to relief under the Alien Tort Claims Act." Id. The 11th Circuit concluded: "The Alien Tort Claims Act establishes a federal forum where courts may fashion domestic common law remedies to give effect to violations of customary international law". Id. at 847.

Accordingly, under binding precedent, the lower courts in this case were charged with determining whether the Plaintiffs could have alleged that Defendants' conduct violated the "law of nations". Indisputably, the lower courts went far beyond their task by drawing factual inferences against Plaintiffs and by basing its decision only upon the allegations of the Amended Complaint, which Plaintiffs sought to amend. The Court made "factual findings" indicating that because the Amended Complaint did not allege that HELM/VOS manufactured or altered the lethal glycerin and because they were not the direct sellers of

the product to Pharval (the Haitian manufacturer of the deadly medicines), Plaintiffs could not allege a violation of the law of nations. (Importantly, besides being inaccurate[5], these findings were based on an Amended Complaint which did not contain allegations specifically invoking the Alien Tort Claims Act.

Moreover, not only did the District Court ignore the restrictions imposed upon it by the standards relating to motions to dismiss and for leave to amend, but also the Court's fact-finding mission went awry in light of the law of nations. The law of nations is commonly understood to include norms of customary international law. In a widely cited case from the Second Circuit, the "law of nations" has been described as the customs and usages of civilized nations as set forth in prominent writings of jurists and commentators who are well-acquainted with the area of law, agreements between nations and other instruments evidencing the norm of customary

[5] The Amended Complaint alleges that HELM/VOS directly shipped the glycerin drums to the Haitian manufacturer and that HELM/VOS altered the container for the products through relabeling and/or repackaging.

international law. Filartiga v. Pena-Irala, 630 F. 2d. 876 (2nd Cir. 1980). The law of nations is involved where the nations of the world have demonstrated that the wrong is of mutual, and not merely several, concern. Id. at 887.

In this case, Plaintiffs unequivocally were prepared to assert the requisite allegations of Defendants' violation of the law of nations. Plaintiffs cited the District Court to numerous resolutions of the General Assembly of the United Nations, World Health Organization quality control documents and other internationally recognized accords regarding certification and labeling of pharmaceutical products utilized in international commerce. Obviously, these norms and requirements are critical components of the law of civilized nations, as the clandestine importation of lethally tainted chemicals is perhaps more dangerous and egregious than any of the more open and preventable violations, such as torture and piracy, which are clearly recognized as violations of the law of nations. See, e.g., Abebe-Jera, supra. Indeed, because tainted pharmaceuticals are quiet and surreptitious

killers, it is particularly important for all nations to strictly monitor the quality of products which are shipped globally. Accordingly, civilized nations are fundamentally and uniformly opposed to obliteration of labels and relabeling product which is known to be tainted for distribution in poor, third world countries.

For example, the World Health Organization, of which HELM/VOS's home country of Germany, the Netherlands and the United States are members, binds its membership to recognize and follow Good Manufacturing Practices (GMP) as well as proper certification practices. Indeed, in 1988, the World Health Assembly, recognizing the potential devastation caused by mislabeled, counterfeited or substandard pharmaceuticals, adopted a resolution calling for the cooperation of all governments in the detection and prevention of distribution of mislabeled, counterfeit and substandard pharmaceutical products. World Health Assembly Resolution 41.16, 13 May 1988. Of course, this resolution was merely an expression of currently accepted international norms adopted by the World Health Organization to prevent

precisely the types of mass killings that occurred as a result of HELM/VOS's mislabeling and miscertification of the deadly, tainted glycerin. See, e.g., United Nations General Assembly Resolution on Consumer Protection, G.A. Res. 39/248 adopted 9 April 1985; Guidelines for Implementation of the WHO Certification Scheme on the Quality of Pharmaceutical Products Moving in International Commerce, Records of WHO #226; WHO Certification Scheme (1988), Document WHA 41/1988/REC/1; WHO Certification Scheme (1996), WHO Technical Report Series #863; and Good Practices in the Manufacture and Quality Control of Drugs (GMP), 1969, WHA 22-50. Accordingly, Plaintiffs provided the District Court with more than ample support for their attempted allegations asserting that HELM/VOS committed torts in violation of the law of nations.

To the extent that allegations of violations of international accords among members of the World Health Organization did not satisfy the District Court, counsel for Plaintiffs also had consulted learned

experts on international law and the World Health Organization concerning the nature and extent of the law of nations as it relates to pharmaceutical products. In fact, in their last motion for extension of time, Plaintiffs' counsel explained that they had consulted experts to assist in analyzing the claims under the Alien Tort Claims Act, but that due to difficult trial schedules in complex cases, Plaintiffs' counsel would need additional time to respond to the motion to dismiss in a complete and exhaustive fashion. The Court denied Plaintiffs' motion and Plaintiffs therefore were required to immediately file their response without exhaustive research.[6] Thus, not only did Plaintiffs provide the Court with written accords, but also advised the Court that experts would be vouching for the claims asserted under the Alien Tort Claims Act. The Court chose to ignore these arguments in its

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[6] Importantly, Plaintiffs' experts were located in various cities and countries. Obviously, to receive and evaluate the law of nations, it is necessary for any expert to engage in analysis of the laws of many countries, which is not an easy affair.

haste to deprive itself of jurisdiction, holding instead that the pleaded allegations of the Amended Complaint (and not what could have been plead) did not constitute a violation of the law of nations.

The District Court further failed to acknowledge the public policy justifications for allowing Plaintiffs to amend their pleading to assert claims under the Alien Tort Claims Act. The Court contemplated a demonstrable difference between this case and cases in which torture is the focus of the Complaint. The Court failed to take account of several cases asserting violations other than torture to invoke jurisdiction under the Alien Tort Claims Act.

For example, in Eastman Kodak Co. v. Kavlin, 978 F. Supp. 1078 (S.D. Fla. 1997), Judge Ryskamp found that allegations of false imprisonment of a company executive to extort a settlement out of the company were sufficient for the company to assert claims under the Alien Tort Claims Act. Moreover, in Adra v. Clift, 195 F. Supp. 857 (D. Md. 1961), the District Court held that a father who was awarded custody of his child could bring an action under the

Alien Tort Claims Act against his former wife as a result of the wife's use of an invalid passport to allegedly "hide" the child. No allegations of torture or other cruel conduct were asserted. Finally, in Aquinda v. Texaco, 1994 WL 142006 (S.D. N.Y.), the District Judge analyzed claims under the Alien Tort Claims Act for environmental destruction caused by Texaco in Ecuador and stated that if the Plaintiffs could establish misuse of hazardous waste of sufficient magnitude to amount to a violation of international law, it would likely allow the claim to proceed.[7] Accordingly, Plaintiffs' claims challenging HELM/VOS's violations of the law of nations in connection with the poisoning deaths of nearly one hundred young children are certainly in line with other cases invoking jurisdiction under the Alien Tort Claims Act. It cannot be said that Plaintiffs are unable to assert an "allegation of a violation of the law of nations", which this Circuit has

[7] Recently, the Second Circuit reviewed another order entered in related litigation which dismissed the Complaint on grounds unrelated to the Alien Tort Claims Act and expressed no comment on the viability of the claims under the Alien Tort Claims Act. Iota v. Texaco, Inc., 157 F. 3d. 153 (2nd Cir. 1998).

established as the criterium for invoking the Court's jurisdiction under 28 U.S.C. § 1350. Abebe-Jire, supra.

Plaintiffs in this case are the devastated families of those children who died or are living with permanent renal failure resulting from the mislabeling and miscertification of glycerin which was mixed into a widely used medicine. Plaintiffs' counsel have repeatedly requested the Court to allow them to amend their pleadings to incorporate allegations asserting Defendants' violations of the law of nations so that jurisdiction can be invoked under 28 U.S.C. § 1350. Plaintiffs have retained experts to assist them in presenting the law of nations as it relates to the global distribution of pharmaceutical products. However, with the stroke of a pen, and in reliance upon only the allegations of the Amended Complaint (which did not assert a claim under the Alien Tort Claims Act) the District Court eviscerated Plaintiffs' claims, leaving them only the grief they will continue to suffer, and concomitantly leaving Defendants with the opportunity to continue relabeling and recertifying, and then

distributing poisonous products to poor, predominantly black, third-world countries.

Finally, to the extent that the District Court was concerned that its decision might expand the Alien Tort Claims Act beyond an acceptable scope, this Court need look no further than the gravity of the tragedy that unfolded in Haiti. To say the least, this case does not open the floodgates into the federal courts. To the contrary, one would hope that mass poisonings remain a rare occurrence, especially when the result is death and injury to innocent children. Suffice it to say that all countries are concerned with the life, health and well-being of their children, and likewise all countries are committed to preventing the importation of tainted pharmaceuticals destined to be consumed by children. The District Court frustrated Plaintiffs' attempt to express this global concern by denying Plaintiffs the opportunity to assert a claim under the Alien Tort Claims Act.

CONCLUSION

The lower courts incorrectly decided issues and questions of federal law. Sanctioning their departure from both the Federal Rules of Civil Procedure and established Supreme Court precedent is the same as sanctioning the conduct that lead to the deaths of the innocent children themselves. Either way, without this Honorable Courts granting of certiorari, the families of dead and dying Haitian children will go without a fair day in court, thus allowing the providers of the lethal pharmaceuticals, who know the products were tainted, to continue their unscrupulous acts without obstruction. For the reasons shown herein, Plaintiffs respectfully request that this Court grant certiorari to cure the seriously erroneous decision of federal law committed by the lower court.

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APPENDIX A - ORDER OF THE U.S. DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA DATED JULY 13, 1998

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 97-511-CIV-MIDDLEBROOKS

WISMANN LUDGER, et al.,

Plaintiffs,

vs.

HELM AG AND VOS B.V.,

Defendants.
_____/

FILED by s/ D.C.
JUL 13 1998
CARLOS JEUNKE
CLERK OF THE
U.S. DIST. CT.
S.D. OF FLA.
MIAMI

ORDER

This CAUSE comes before the Court upon Defendants' Motions to Dismiss (DE # 14 and DE # 17) and For Fees, Costs and Sanctions (DE #25).

Appendix A

This case involves claims arising out of the death and injury of several children in Haiti allegedly caused by a pharmaceutical product manufactured in Haiti, by a Haitian company. The complaint alleges that an ingredient of the product was contaminated in China, sold to a German company and a Netherlands corporation for its shipment to Haiti.

Federal Courts have no diversity jurisdiction over suits between aliens. *Montalet v. Murray,* 4 CRANCH. (8 U.S.) 46, 2 L.Ed. 545 (1807). The defendants in this case are alien corporations. The plaintiffs consist of personal representatives of the estates of the deceased children and the parents as natural guardians of the children who survived. Of

the plaintiffs, fourteen of the parents or guardians are "citizens and/or residents" of the Country of Haiti and forty-three of the personal representatives are "citizens and/or residents" of Haiti. A suit between citizens of Haiti and Dutch and German corporations does not fall within the diversity or alienage jurisdiction of the federal courts.

Plaintiffs argue, however, that some of the plaintiffs are domiciled in the state of Florida and in support of that proposition have filed eight affidavits, two from individuals who are not parties to this suit, and the remaining from alleged representatives of decedents or infants in an attempt to establish domiciliary jurisdiction.

Defendants, however, point to 28 U.S.C. § 1332(c)(2) which states:

> The legal representative of the estate of decedent shall be deemed to be a citizen of only the same state as the decedent, and the legal representative of an infant or incompetent shall be deemed to be a citizen of the same state as the infant or incompetent.

Plaintiffs have provided no information showing that any of the decedents or infants were citizens or residents of any state.

Moreover, even if it were to be assumed that this deficiency could be corrected through amendment, the Eleventh Circuit has held that the presence of aliens on both sides of an action destroys complete diversity and defeats jurisdiction. *Cabalceta v. Standard Fruit Co.*, 883 F.2d. 1553

(11th Cir. 1989); *Ed & Fred, Inc. v. Puritan Mar. Ins. U. Corp.*, 506 F.2d. 757 (5th Cir. 1975). While the plaintiffs are critical of the Eleventh Circuit's reasoning and anaylsis and suggest that "[i]t is time that this judicially created exception to the diversity statute is laid to rest," their invitation is misdirected.[1] The Eleventh Circuit is binding authority in this district. Even if it were to be assumed that certain of the plaintiffs could be shown to be domiciled in Florida, 28 U.S.C. §

[1] Plaintiffs only authority for this remarkable invitation is a statement taken out of context from Judge Posner's decision in *Allendale Mut. Inc. v. Bull Data Systems*, 10 F.3d 425 (7th Cir. 1993). While Posner does suggest that it is puzzling why the presence of aliens on both sides defeats complete diversity he then proceeds to state, in language omitted by plaintiffs, that "the answer is found in the details of the statutory framework."

1332(a)(2) does not permit a suit between aliens and a mixture of citizens and aliens.

The Amended Complaint in this action relied upon diversity as the basis for federal jurisdiction. The defendants moved to dismiss arguing a lack of diversity and at a status conference the Court cautioned plaintiffs about the apparent lack of jurisdiction. Subsequently plaintiffs filed a response to the motion to dismiss which also seeks to rely upon federal question jurisdiction. Plaintiffs argue that jurisdiction is created by 28 U.S.C. § 1350 which provides that "[T]he District Court shall have original jurisdiction of any civil action by an alien for tort only,

committed in violation of the law of nations or a treaty of the United States."

However, if a controversy existing among individuals neither involves internal relations nor impinges upon a nation's exercise of its sovereignty, jurisdiction will not lie under 28 U.S.C. § 1350. *Cohen v. Hartman*, 634 F.2d 318 (5th Cir. 1981). When considering Alien Tort statute claims on a motion to dismiss for lack of subject matter jurisdiction, courts typically engage in a more searching preliminary review of the merits than is required, for example under the more flexible "arising under" formulation. *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980).

Appendix A

Here the Amended Complaint describes this case as a "product liability action." As alleged in the complaint, VOS contacted Metall-Chemie, a chemical trader/broker located in Hamburg, Germany and ordered 72 drums of "glycerine." Metall-Chemie contacted a trading company in China which sold the 72 drums of glycerine to Metall-Chemie, which in turn sold the 72 drums of glycerine to VOS, which then sold the 72 drums of glycerine to Chemical Trading & Consulting Gmblt, which ultimately sold the 72 drums of glycerine to Pharval, the manufacturer of the tainted medicine. The re-stenciling which plaintiffs allege VOS performed which obliterated the original labels thereby preventing disclosure of the original

manufacturer, is described in the complaint as a standard practice known as "neutralization." (Para 42, Amended Complaint). Under the facts as alleged, the defendants did not manufacture the glycerine, but participated in the chain of destruction of the product. Defendants did not alter the product and were not the seller of the product to Pharval, the manufacturer of the medicine allegedly consumed by the children.

These allegations do not constitute a violation of the "law of nations." *See, Cohen v. Hartman, supra.* While plaintiffs point to various resolutions by the World Health Assembly and United Nations concerning consumer protection and substandard pharmaceutical preparation, they

point to no violation of international law or treaty. "It is only where the nations of the world have demonstrated that the wrong is of mutual and not merely several concern, by means of express international accords, that a wrong generally recognized becomes an international law violation within the meaning of the statute." *Filartiga,* 630 F.2d at 888.

Plaintiffs through their counsel describe the defendants as "an enemy of all mankind" and argue that what they previously called a product liability action is in actuality genocide. In support of this theory they rely upon the Second Circuit decision in *Kadic v. Karadzic,* 70 F.3d 232 (2nd Cir. 1995) which involved the atrocities committed in Bosnia

by the insurgent Bosnian-Serbs. Comparison demonstrates the difference. While plaintiffs' counsels' emotions may be understandable the allegations of this case, if true, do not show an "intent to destroy, in whole or in part, a national, ethical, racial or religious group." The accusation of genocide in order to attempt to fit within the confines of *Kadic v. Karadzic, supra*, is inappropriate.

Upon consideration, it is ORDERED AND ADJUDGED that Defendants' Motions to Dismiss are GRANTED because the Amended Complaint fails for lack of subject matter jurisdiction because of lack of a federal question or complete diversity.

It is FURTHER ORDERED AND ADJUDGED that Defendants' Motion for Fees, Costs and Sanctions (DE #25) is DENIED.

DONE AND ORDERED in chambers, at Miami, Florida, this 15th day of July, 1998.

s/DONALD M. MIDDLEBROOKS
UNITED STATES DISTRICT JUDGE

Copies provided to:
Counsel of record

* * * *

APPENDIX B – ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT DATED NOV. 16, 1999, ISSUED AS MANDATE ON JAN. 24, 2000

United States Court of Appeals
For the Eleventh Circuit

No. 98-5220

District Court Docket No. 97-00511-CV

WISMANN LUDGER, GERALD JOACHIM. MOREL BERARD, et al.,

Plaintiffs-Appellants,
Cross-Appellees,

versus

HELM AG, VOS B.V.,

Defendants.-Appellees,
Cross-Appellants.

Appendix B

Appeals from the United States District Court
for the Southern District of Florida

Before EDMONDSON and BARKETT, Circuit Judges, and COHILL*, Senior District Judge.

JUDGMENT

These causes came to be heard on the transcript of the record from the United States District Court for the Southern District of Florida, and were argued by counsel;

UPON CONSIDERATION WHEREOF, it is now hereby ordered and adjudged by this Court that the judgments of the said District Court in these causes be and the same are hereby AFFIRMED;

It is FURTHER ORDERED THAT each party bears their own costs on appeal to be taxed by the Clerk of Court.

Appendix B

Entered: November 16, 1999
For the Court: Thomas K. Kahn,
Clerk

By: s/Matt Davidson
Deputy Clerk

ISSUED AS MANDATE: JAN 24 2000

* Honorable Maurice B. Cohill, Jr., Senior U.S. District Judge for the Western Disrtict of Pennsylvania, sitting by designation.

Appendix C

Statutes

28 U.S.C. § 1350

Alien's action for tort.

The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.

12(b) Fed.R.Civ.P.

(b) **How Presented**. Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or

third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) improper venue, (4) insufficiency of process, (5) insufficiency of service of process, (6) failure to state a claim upon which relief can be granted, (7) failure to join a party under Rule 19. A motion making any of these defenses shall be made before pleading if a further pleading is permitted. No defense or

objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion. If a pleading sets forth a claim for relief to which the adverse party is not required to serve a responsive pleading, the adverse party may assert at the trial any defense in law or fact to that claim for relief. If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and

disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

15(a) Fed.R.Civ.P.

(a) **Amendments**. A party may amend the party's pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, the party may so amend it at any time within 20 days after it is

served. Otherwise a party may amend the party's pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires. A party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within 10 days after service of the amended pleading, whichever period may be the longer, unless the court otherwise orders.

Supreme Court, U.S.
FILED
JUN 23 2000
CLERK

(2)

Docket No.: 99-1890

SUPREME COURT OF THE UNITED STATES

WISMANN LUDGER, *et al.*, Petitioners

vs.

HELM AG and VOS BV, Respondents

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

---

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

RONALD O. ARMBRUST
JEFFREY B. SHAPIRO
Counsel of Record for Respondents
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43pp

QUESTION PRESENTED FOR REVIEW

Whether the Eleventh Circuit Court of Appeals erred in affirming the district court's dismissal of this action for want of federal jurisdiction under the Alien Tort Claims Act, 28 U.S.C. § 1350.

LIST OF PARTIES TO THE PROCEEDING

AND RULE 29 LIST

1. ALINE ALEXANDRE, as Personal Representative of the Estate of Stanley Mardy (deceased)
2. CHARLITOT "CHARLIE" ALEXIS, as Personal Representative of the Estate of David Alexis (deceased)
3. HUBERT ALEXIS, as Personal Representative of the Estate of Therbuh Alexis (deceased)
4. EDDY BENJAMIN, as Personal Representative of the Estate of Benjamin Peterson (deceased)
5. MOREL BERARD, as Personal Representative of the Estate of Rose-Cathie Berard (deceased)
6. YANICK BLAISE, as Personal Representative of the Estate of Albert Patrice (deceased)

7. SYLVESTER CADET, as Personal Representative of the Estate of Mithsou Cadet (deceased); and as natural parent and guardian of Spady Cadet, a minor

8. LUC CENAT, as Personal Representative of the Estate of Cherlot Cenat (deceased)

9. ROOSEVELT CENATUS, as Personal Representative of the Estate of Louvenice Cenatus (deceased)

10. JACQUELINE CHARLES, as Personal Representative of the Estate of Claire Sarllah Charles-Francois (deceased)

11. MARIE ELINE CLERMOND, as Personal Representative of the Estate of Claurens Clermond (deceased)

12. JOSEPH EMMANUEL CLERVIL, as Personal Representative of the Estate of Westingueire Clervil (deceased)
13. JEAN FITO DANIEL, as Personal Representative of the Estate of Sabine Daniel (deceased)
14. LEONIE DERIVEAU, as natural parent and guardian of Kesnia Thama Gracia, a minor
15. MARIE DEPHOSE DORCELUS, as Personal Representative of the Estate of Naomie Dorcelus (deceased)
16. SAMUEL DOUCE, as Personal Representative of the Estate of Wildor Douce (deceased)
17. MARIE EDME, as natural parent and guardian of Antonioni Philibert, a minor
18. JEAN CLAUDE GEDEON, as Personal Representative of the Estate of Godson Gedeon (deceased)

19. ROGER GERARD, as Personal Representative of the Estate of Falonne Gerard (deceased)
20. LOUIS KESNEL GRACIA, as natural parent and guardian of Kesnia Thama Gracia, a minor
21. MICHIELTNE GREGOIRE, as Personal Representative of the Estate of Farah Raphael (deceased)
22. HELM AG
23. NICOLE HILIARE, as Personal Representative of the Estate of Harryson Charles Fils (deceased)
24. ALTAGRACE JACKSON, as natural parent and guardian of Rood Schneider Jackson, a minor
25. FENOLD JACKSON, as Personal Representative of the Estate of Bill Jerry Jackson (deceased); and as natural parent and guardian of Rood Schneider Jackson, a minor

26. HABIB JAMIL-ALI, as Personal Representative of the Estate of Shemli Jamil Ali (deceased)

27. EVENS JEAN, as natural parent and guardian of Samir Jean, a minor

28. WISLIN JEAN, as natural parent and guardian of Faika Jean, a minor

29. MARIE CAMEL JEAN-BAPTISTE, as Personal Representative of the Estate of Vandelfric Jean-Baptiste (deceased)

30. GERALD JOACHIM, as Personal Representative of the Estate of Rachelle Joachim (deceased); and as natural parent and guardian of Jamason Joachim, a minor

31. MARIE ROSELENE JOSEPH, as Personal Representative of the Estate of Samuel Davens Joseph (deceased)

32. VILINORD LECLERC, as Personal Representative of the Estate of Walsonord De Kingkino Leclerc (deceased)

33. MARIETTE HILDA LOUIS, as Personal Representative of the Estate of Christy Laure Louis (deceased)

34. WISMANN LUDGER, as Personal Representative of the Estate of Youri Ludger (deceased)

35. DARLYNE MACON, as natural parent and guardian of Oliver Macon, a minor

36. MERSON MACON, as natural parent and guardian of Oliver Macon, a minor

37. FRANTZ MICHEL, as natural parent and guardian of Erwen Michel, a minor

38. JEAN FRANCOIS MIMOSE, as natural parent and guardian of Spady Cadet, a minor

39. EYLSEE MINOUSE, as natural parent and guardian of Jamason Joachim, a minor

40. JEAN ROOSEVELT MONDESIR, as Personal Representative of the Estate of Vladimir Mondesir (deceased)

41. LUCINE MOUSSIGNAC, as Personal Representative of the Estate of Micheline Moussignac (deceased)

42. MARIE MYRTHIL, as Personal Representative of the Estate of Schneilyne Vibert (deceased)

43. ROMANE NORE, as Personal Representative of the Estate of Jemimah Nore (deceased)

44. CELITA PAIJLEUS, as Personal Representative of the Estate of Stephanie Pierre Louis (deceased)

45. MARIE PAYEN, as Personal Representative of the Estate of Pamela Sue Payen (deceased)

46. PIERRE PHILIBERT, as natural parent and guardian of Antonioni Philibert, a minor

47. YVROSE PIERRE-LOUIS, as Personal Representative of the Estate of Jean-Louis Daril Michel (deceased); and natural parent and guardian of Erwen Michel, a minor

48. ASTRIDE RICHARD, as natural parent and guardian of Faika Jean, a minor

49. FRITZ ST. JEAN, as Personal Representative of the Estate of Nico Phillipe Kervens St. Jean (deceased)

50. MARIE ANITHE ST. JEAN, as Personal Representative of the Estate of Cindy Arthelus (deceased)

51. VERDIEU ST. LOUIS, as Personal Representative of the Estate of Farah St. Louis (deceased)

52. MICHEL ST. VAL., as Personal Representative of the Estate of Mirlene St. Val, (deceased)

53. ELVIA SEMERZIER, as Personal Representative of the Estate of Makenson La Fortune (deceased)

54. JEAN TELEMAQUE, as Personal Representative of the Estate of Stanley Telemaque (deceased)

55. VENANTE VILLARSSON, as Personal Representative of the Estate of Mathieu Rocheny (deceased)

56. VOS B.V.

57. LUC ZAMOR, as Personal Representative of the Estate of Pierre Ludenson Zamor (deceased)

58. MASCELIN ZEPHYR, as Personal Representative of the Estate of Daphnee Zephyr (deceased)

NOTATION: There are no parent companies or subsidiary companies other than the two defendant companies to be listed.

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STATEMENT OF THE CASE

This is a product liability action arising from the unfortunate deaths and injury of Haitian children which allegedly resulted from their ingestion of anti-fever syrups containing glycerine tainted with diethylene glycol. This case was filed February 27, 1997 against Helm AG ("Helm") and VOS B.V. ("VOS"), middlemen in the distribution of allegedly tainted glycerine, purchased by VOS from other middlemen who had certified it as pharmaceutically pure.

(i) Course of Proceedings

A Complaint was filed on February 27, 1997 on behalf of the representatives of children who allegedly died or were injured as a result of the ingestion of the anti-fever medicine. On July 8, 1997, Plaintiffs amended their Complaint primarily to include additional

Plaintiffs. The Amended Complaint serves as the operative pleading, which the district court dismissed.

The Amended Complaint describes this matter as a "product liability action" and contains allegations relating to Helm's and VOS' conduct in connection with the damages suffered by the Plaintiffs when medicine made with contaminated glycerine was ingested. Plaintiffs allege that Helm and VOS "utilized an inferior method to test the glycerine." They also claim Helm and VOS knew or should have known "that the glycerine was suspect." Additionally, they contend VOS and Helm "had a standard practice" of re-stenciling labels on chemical known as "neutralization" to "protect their business interests." Plaintiffs allege Helm and VOS contacted Metall-Chemie, a chemical trader/broker located in Hamburg, Germany, and placed an order for

72 x 250 K.G. drums of "glycerine min. 98% U.S.P. 21." "Metall-Chemie sent a confirmation of the order to Defendants, Helm and VOS . . ." "Metall-Chemie then contacted a trading company in China (*i.e.* Sinochem) and ordered 72 x 250 K.G. drums of glycerine U.S.P. 21 . . ." Sincochem then sold the 72 drums to Metall-Chemie, which in turn sold the 72 drums to VOS, which then sold the 72 drums to Chemical Trading and Consulting GMBH, which ultimately sold the 72 drums to Pharval, the Haitian manufacturer of the tainted medicine. "Metall-Chemie was provided a certificate of analysis of the glycerine, indicating the product to be 'Glycerine U.S.P. with an assay of 98.36%.'" It should be emphasized, Metall-Chemie sold to VOS and provided VOS with this certification.

In November 1997, Helm and VOS filed a Motion to Dismiss pursuant to Federal Rule of Civil Procedure 12(b). This Motion raised two arguments for dismissal of the Complaint: (1) lack of subject matter jurisdiction; and (2) lack of personal jurisdiction

In this regard, a status conference was held on January 16, 1998. At this conference, "Plaintiffs asked for leave to amend the Amended Complaint to allege, in addition to diversity jurisdiction, original federal question jurisdiction." "The court denied the request at that time and directed the Plaintiffs to demonstrate the basis for federal question jurisdiction in the response to Defendants' Motion to Dismiss" (emphasis added) in lieu of filing another amended complaint. (The foregoing quotations are taken from Plaintiffs' response to Defendant's motion to dismiss.)

After four motions to extend the time to respond, Plaintiffs finally served their response on April 27, 1998 which addressed original federal question jurisdiction as requested by the court, some five months after the Motion to Dismiss was filed.

After reviewing Plaintiffs' attempts to demonstrate jurisdiction based on federal question, on July 15, 1998 the district court granted the Motion to Dismiss reasoning:

> Under the facts as alleged, the defendants did not manufacture the glycerine, but participated in the chain of destruction [sic] [distribution] of the product. Defendants did not alter the product and were not the seller of the product to

Pharval, the manufacturer of the medicine allegedly consumed by the children.

These allegations do not constitute a violation of the "law of nations." While Plaintiffs point to various resolutions by the World Health Assembly and United Nations concerning consumer protection and substandard pharmaceutical preparation, they point to no violation of international law or treaty. "It is only where the nations of the world have demonstrated the wrong is of mutual and not merely several concern, by means of express international accords, that a wrong generally recognized becomes an international law violation

within the meaning of the statute." *Filartiga v. Pena-Irala*, 630 F.2d 876, 888 (2d Cir. 1980).

It is clear from the District Court's Order, Appendix A in Plaintiff's Petition, the court considered not only the allegations of the Amended Complaint, but also the new claims contained in Plaintiffs' response brief in reaching its decision. The second paragraph above of the court's Order is specifically dedicated to addressing the jurisdictional allegations of Plaintiffs' brief.

(ii) Statement of the Facts

Plaintiffs allege that glycerine, an ingredient used in the manufacture of the anti-fever medicine, was contaminated when the glycerine was placed into the stream of commerce. The glycerine was placed into the

stream of commerce in China by the conduct of a Chinese company, Sinochem. The Amended Complaint alleges the glycerine was originally sold by Sinochem to Metall-Chemie, a middleman which sold it to Helm and VOS. Plaintiffs also claim the glycerine was shipped directly from China to Rotterdam, Netherlands via China Ocean Shipping Co., Vessel 2 Hong He U.12.

Plaintiffs allege Helm and VOS then sold the glycerine to Chemical Trading and Consulting GMBH ("CTC"), a middleman which sold it to Pharval Laboratories, the Haitian pharmaceutical company. The glycerine was shipped directly to the Haitian manufacturer from the Netherlands to Port-au-Prince, Haiti, and arrived at Agences Pehacheve, Pharval's sister company in Haiti. The anti-fever medicine, an over-the-counter remedy made with the glycerine, was sold in

Haiti and ingested by Haitian children in Haiti often at the prescription of Haitian doctors.

The Amended Complaint alleges the certification provided to Metall-Chemie, the seller of the glycerine to VOS and Helm, indicated the product to be "Glycerin U.S.P. with an assay of 98.36%." The certification provided to Metall-Chemie indicated the product to be "Glycerin U.S.P. with an assay of 98.36%." This certification in turn was provided to VOS. The analysis from the laboratory with which VOS contracted, SGS Laboratory Services, did not indicate the presence of diethylene glycol. Indeed, the analysis from the laboratory with which VOS contracted did not find the glycerin to be grossly miscolored as a result of the diethylene glycol content. Plaintiffs' statement to the contrary in their brief at page 1, line 10, is simply

incorrect. In fact, the analysis only showed the glycerine to be "off-hue." But, more important, the analysis was received by VOS after the glycerine had been sold to Mettal-Chemie and shipped. Neither Helm nor VOS knowingly sold and shipped diethylene glycol contaminated glycerine. (VOS sold the glycerine to CTC on February 23, 1995, paragraph 48 of the Amended Complaint. The glycerine was shipped on February 25, 1995, paragraph 50 of the Amended Complaint. The analysis was prepared on March 2, 1995, paragraph 14 of Plaintiffs' response.)

SUMMARY OF THE ARGUMENT

Plaintiffs, in their Amended Complaint, their response to Defendants' motion to dismiss, and their appellate brief have failed to show a basis for federal question jurisdiction under the Alien Tort Claims Act, 28 U.S.C. § 1350. Plaintiffs were given ample opportunity to demonstrate this to the lower courts, but failed to do so. Therefore, the district court and appellate court, properly concluded any such amendment to the Plaintiffs' pleadings would be a futile act.

From the very facts alleged by Plaintiffs, Helm and VOS were merely middlemen in the chain of distribution of the glycerine which is at the heart of this matter. Defendants neither manufactured nor altered the glycerine nor did they sell it to the pharmaceutical manufacturer or the end users. Nor was it known by

Helm and VOS at the time it was sold and shipped it was contaminated. HELM's and VOS' actions do not constitute a violation of the law of nations, as the two courts below have previously determined.

ARGUMENT

i. Limitations of Freely Granting Leave to Amendment Under Federal Rule of Civil Procedure 15(a).

Rather than require Plaintiffs to file a second amended complaint, the district court allowed Plaintiffs to present additional information in their responsive brief to the motion to dismiss relative to federal question jurisdiction. That notwithstanding, and after assessing Plaintiffs' jurisdictional argument, in total, the district court found:

> These allegations do not constitute a violation of the law of nations. *See Cohen v. Hartman, supra* [634 F.2d 318 (5th Cir. 1981)]. While Plaintiffs point to various resolutions by the World Health Assembly

> and United Nations concerning consumer protection and substandard pharmaceutical preparation, they point to no violation of international law or treaty.

The district court allowed Plaintiffs an opportunity to demonstrate federal question jurisdiction as an alternative basis for jurisdiction. After doing so, the court rightfully concluded federal question jurisdiction, based on allegations taken from Plaintiffs' Amended Complaint and Plaintiffs' responsive brief, did not apply. The Plaintiffs likewise failed to provide a viable argument supporting federal question jurisdiction in their initial appellate brief. And here, before this Court, they have supplied nothing new by way of argument or fact, not already provided to the district court or appellate

court. Plaintiffs still cannot present sufficient facts in support of their claim which would entitle them to relief.

In their appellate brief Plaintiffs cited certain supporting authorities. Specifically, they noted the Fifth Circuit's holding that "dismissal for want of jurisdiction is generally not favored when an alternative basis for jurisdiction exists." (citing *Seagraves v. Harris,* 629 F.2d 385, 390 (5th Cir. 1980) (emphasis added)). The language cited in the *Seagraves* decision, conspicuously absent in their petition for writ, underscores the justified basis upon which the district court dismissed the Amended Complaint. Simply stated, after a review of the Amended Complaint and Plaintiffs' brief, no alternative basis for subject matter jurisdiction exists.

Although Plaintiffs correctly state Federal Rule of Civil Procedure 15(a) states that leave to amend should

be given freely when justice so requires, this broad principle is not without court-interpreted limitations.

The Plaintiffs rely upon *Forman v. Davis*, 371 U.S. 78, 83 S. Ct. 227, 230 (1962). But in so doing, they fail to acknowledge this Court's holding that, "futility of amendment" is an apparent reason for which a court may properly refuse to allow amendment. As the court stated there:

> In the absence of any appearance or declared reason–such as undue delay, . . . futility of amendment, etc.–the relief sought should, as the rules require, be "freely given."

Futility of amendment is an issue now squarely before this Court. The district court allowed Plaintiffs an opportunity to disclose the basis for federal question

jurisdiction. The court then found that disclosure unpersuasive and determined amendment would be futile. It thus reasonably denied Plaintiffs' motion to amend and provided justifying reason in its order which was within the court's discretion. As stated in *Forman, supra*:

> Of course, the grant or denial of an opportunity to amend is within the discretion of the district court, but outright refusal to grant the leave without any justifying reason appearing for the denial is not an exercise of discretion.

Further, Plaintiffs claim error by the district court. Specifically, they again allege the district court "went far beyond its task by . . . basing its decision only upon the allegations of the Amended Complaint, which

Plaintiffs sought to amend." (*See* Plaintiffs' Petition at p. 19).

Plaintiffs are far less than accurate in their position. The district court did not base its decision only upon the allegations of the Amended Complaint. It is patent from its order that the district court considered the disclosure Plaintiffs made in their responsive brief; a disclosure solicited by the trial court in lieu of an amended complaint. To state the court came to its decision "in reliance upon only the allegations of the Amended Complaint" is inaccurate.

ii. Inadequate Basis to Allow Amendment to Include Jurisdictional Allegations under the Alien Tort Claims Act, 28 U.S.C. § 1350.

The Alien Tort Claims Act provides that, "The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." 28 U.S.C. § 1350. The Act confers federal subject matter jurisdiction upon the establishment of three enumerated conditions: (1) an alien sues; (2) for a tort; (3) committed in violation of the law of nations. *Kadic v. Karadzk,* 70 F.3d 232, 238 (2d Cir. 1995).

In *Kadic,* the court went on to further state,

> [I]t is not a sufficient basis for jurisdiction to plead merely a colorable violation of

law of nations. There is no federal subject matter jurisdiction under the Alien Tort Act unless the complaint adequately pleads a violation of the law of nations (or treaty of the United States).

The issue before the Court and which is fundamental to Petitioners' argument, is whether the actions of Helm and VOS, as alleged in the Amended Complaint and Plaintiffs' responsive brief, constitute a violation of the law of nations.

Plaintiffs' refer to *Filartiga,* 630 F.2d at 876, a case where the act violative of the law of nations was official torture. Plaintiffs state "The law of nations is involved where the nations of the world have demonstrated that the wrong is a mutual, and not merely several concern." *Id.* at 887. Placing this in context

(and correcting for the page number), the Second Circuit actually wrote:

> In IIT, Judge Friendly astutely noted that the mere fact that every nation's municipal law may prohibit theft does not incorporate "the Eighth Commandment Thou shalt not steal into the law of nations." It is only where the nations of the world have demonstrated that the wrong is a mutual, and not merely several concern by means of expressed international accords that a wrong generally recognized becomes an international law violation within the meaning of the statute. *Id.* at 888 (emphasis added).

While Plaintiffs point to various resolutions by the World Health Assembly and United Nations concerning consumer protection and substandard pharmaceutical preparation, no violation of international law or treaty is shown, as required. Helm's and VOS' alleged actions do not violate the law of nations when VOS only acted as a middleman in the chain of distribution of an allegedly defective product. Plaintiffs' do not point to and cannot cite any factually similar case in which any court permitted a claim to proceed under the Alien Tort Claims Act based on a violation of the law of nations, because none exist. Those decisions involving individuals or private parties where jurisdiction based on the Alien Tort Act was found involved piracy, slave trade, war crimes and genocide. Crimes such as torture and summary execution, where

not perpetrated in the course of genocide or war crimes, in order to be a violation of the law of nations must be committed by state officials or under color of law. *Kadic, supra.* Beyond any legitimate dispute, the alleged actions of Helm and VOS do not rise to the level of such conduct.

In sum, though Plaintiffs aver they are "prepared to allege that Defendants violated the law of nations," they cannot "adequately" plead a violation of the law of nations.

iii. Additional Misstatements

At the outset of the petition, in the Question Presented for Review, Plaintiffs characterize the Defendants as ". . . providers of lethal pharmaceutical products, who knew the products to be tainted." This statement is, at best, misleading. While Defendants may

know today the glycerine was contaminated with diethylene glycol when it was used in the manufacture of the fever medicine, Defendants did not know that at the time it was sold by them and shipped. Plaintiffs make no jurisdictional allegations to the contrary. This is clear from Plaintiffs' Amended Complaint and from all of the briefs prepared by them to date. Plaintiffs have attempted to mislead the court by innuendo. This is objectionable.

Plaintiffs employ this tactic again at page two of the Petition where they state Defendants ". . . knowingly provided the lethal component of the anti-fever syrup . . ." While it is true Plaintiffs claim Defendants knowingly provided the glycerine, nowhere is it alleged in the jurisdictional allegations Defendants knew it was

contaminated with diethylene glycol when it was allegedly provided.

Early in the Petition, Plaintiffs highlight an argument made by Defendants concerning limiting review of the district court solely to that which was presented in the Amended Complaint. This is nothing but an attempt by Plaintiffs at misdirection. It is obvious this argument was not embraced by the court and did not enter into its decision. Though Defendants' argument was directed to jurisdictional issues, it was in large part directed to scandalous accusations and irrelevant material raised in Plaintiffs' responsive brief concerning Defendants' past business history. Plaintiffs again have raised these in their Petition.

As to this, Defendants vehemently deny the reprehensible conduct of which they are accused and

object to the inclusion of such accusations clearly not germane to the issues at hand. Such tactics can only be designed as an attempt to cause prejudice and distract this Court from the real issues to be resolved.

Plaintiffs know that because of constraints imposed here, Defendants in refutation of such scandalous and impertinent accusations may only state the truth is not as it is claimed. And, in this regard, Defendants submit that even assuming all of Plaintiffs' allegations to be true, federal jurisdiction would still not lie.

Plaintiffs in their List of All Parties to Proceeding include Helm US Chemical Corporation, Helm New York Chemical Corporation, Helm Fertilizer, Helena Terminal, Helm Fertilizer Corporation, and Helm

Fertilizer, Inc. These entities are not parties to the proceeding. Defendants object to their inclusion.

CONCLUSION

Plaintiffs demonstrate no basis upon which to establish federal question jurisdiction in this case. Any pleading amendment that Plaintiffs may have attempted concerning the Alien Tort Claims Act would have been a "useless act" because the statute simply does not apply.

In support of their position that a jurisdictional basis exists in the Alien Tort Claims Act, Plaintiffs point to resolutions passed by the World Health Assembly and United Nations as legally binding. This is misleading. Plaintiffs can produce no evidence to establish a violation of international law or treaty as required by the Alien Tort Claims Act. The district court, in its Order granting Helm's and VOS' Motion to Dismiss, may have expressed it best when it stated,

> Plaintiffs through their counsel describe the defendants as "an enemy of all mankind" and argue that what they previously called a product liability action is actuality genocide . . . While plaintiffs' counsels' emotions may be understandable, the allegations of this case, if true, do not show an 'intent to destroy, in whole or in part, a national, ethnical, racial or religious group.'"

Clearly, the district court's and the appellate court's decisions must be affirmed.